(1)

90-803

No. 90-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

JOHN DOE,
Petitioner,

v.

H. LAWRENCE GARRETT, as
Secretary of the Department of
the Navy, et al.,
Respondents.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

William J. Sheppard
SHEPPARD & WHITE, P.A.
215 Washington Street
Jacksonville, FL 32202
(904) 356-9661

QUESTIONS PRESENTED

1. Is the absolute "military exception" applied by some courts to Title VII [42 U.S.C. §2000e, et seq.] legitimately applied to bar the claim of an Human Immunodeficiency Virus ("HIV") - positive Naval Reservist who was discharged based solely on his handicap in violation of the antidiscrimination provision of the Rehabilitation Act [29 U.S.C. §794]?

2. May an HIV-positive Naval Reservist pursue his claims that he was deprived of protected liberty and property interests when he was discharged on the sole basis of his handicap, where the Navy changed its initial policy prohibiting discharge of HIV-positive personnel after his enlistment?

PARTIES

In addition to the named respondents, former parties to this lawsuit are former Secretary of the Navy William Ball and former Secretary of the Navy James Webb.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 903 F.2d 1155 and is reproduced in the appendix at 1a - 35a. The opinion of the United States District Court for the Middle District of Florida is reported at 725 F.Supp. 1210 and is reproduced in the appendix at 36a - 64a.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 1990. The decision of the court of appeals denying petitioner's petition for rehearing and suggestion for rehearing en banc was entered on August 17, 1990. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS AT ISSUE

29 U.S.C. §794(a) provides in pertinent part:

> No otherwise qualified individual with handicaps in the United States ... shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. §794a(a)(2) provides:

> (2) The remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964, [42 U.S.C. §2000d et seq.], shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of assistance under section 504 of this Act [29 U.S.C. § 794].

STATEMENT OF THE CASE

The issues presented in this case are 1) whether the antidiscrimination provision of the Rehabilitation Act, which proscribes discriminatory treatment by Executive agencies based solely on handicap, protects military personnel, and 2) whether an HIV-positive enlistee was deprived of protected property and liberty interests without due process when he was discharged on the basis of his handicap, when pertinent Naval regulations in effect at

the time of his enlistment explicitly prohibited the discharge of HIV-positive personnel on that basis.

The initial basis for federal jurisdiction was 28 U.S.C. §§ 1331 & 1343.

1. Proceedings in the District Court

Petitioner, John Doe, enlisted in the Navy in 1972 and served, with a short break in 1975, until 1977. In 1981, he reenlisted in the Naval Reserves and served until his discharge in January, 1985. In July of that year, he was accepted into the Naval Reserve Canvasser Recruiter Program for a two-year term as a temporary active duty Navy recruiter. He reported for duty on November 25, 1985. Ten days later, the Secretary of the Navy promulgated a regulation, Instruction 5300.30, providing that Naval personnel infected with the AIDS virus but who are asymptomatic "shall be retained in service." Following his

receipt of excellent evaluations, Doe's initial term of service was extended, on July 8, 1986, to September 30, 1987. On July 20, 1986, however, Doe learned that he had tested positive for the Human Immunodeficiency Virus, and he was informed that, because of his infection, he would not be allowed to continue on active duty beyond September 30, 1986, despite the previous extension of his service to September 30, 1987.

On September 22, 1986, Doe brought suit, including a motion for a preliminary injunction, alleging violations of Section 791 and Section 794 of the Rehabilitation Act and of the Fifth Amendment's Due Process Clause. Upon instruction by the district court to exhaust all possible administrative remedies, Doe turned to the Board for Correction of Naval Records, which concluded that the Navy had erred in

discharging him and consequently awarded Doe the compensation to which he was entitled had he completed his initial term of service, through September 30, 1987. Meanwhile, on April 20, 1987, the Secretary of Defense issued a regulation reversing Navy policy on HIV-positive personnel, mandating that such individuals were ineligible for active duty service. In April, 1988, Doe returned to the district court, alleging that the administrative remedies he received failed to afford him sufficient relief on his Rehabilitation Act and constitutional claims.

The district court granted summary judgment on behalf of the Navy on all claims. The court first considered whether the Rehabilitation Act applied to uniformed members of the armed forces. The court reasoned that it "must look to the remedial framework of Title VII" to determine the

scope of the Rehabilitation Act, and recognized that several of the courts of appeals which have addressed the issue have held that uniformed military personnel may not enforce Title VII. The district court concluded that Doe consequently could not invoke the protection of the Rehabilitation Act. The court also rejected Doe's claims that he was deprived of protected property and liberty interests without due process in violation of the Fifth Amendment.

2. Opinion of the Court of Appeals

The court of appeals affirmed. Noting that HIV-positivity is clearly a "handicap" under the terms of the Rehabilitation Act, the court of appeals addressed Doe's claim that the district court erred by relying on Title VII case authority when Section 794a(a)(2) of the Act directs enforcers of Section 794 of the Act, its antidiscrimination provision, to the

"remedies, procedures, and rights" of Title VI. Doe argued that Congress expressly distinguished between Section 794 of the Act, which adopted the remedies of Title VI, and Section 791 of the Act, (its affirmative action provision), which, in Section 794a(a)(1), adopted the remedial framework of Title VII.

Acknowledging this distinction, which the district court failed to do, the court of appeals nonetheless upheld the district court's application of a "military exception" to Section 794 of the Rehabilitation Act. Although recognizing, for example, that "it is established, as a general matter, that Title VI - and by extension Section 794 - does not incorporate Title VII's requirement of exhaustion of administrative remedies," the court of appeals nonetheless approved of several cases holding that enforcers of

Section 791 and Section 794 alike must first exhaust all administrative remedies. According to the court,

> We think this conclusion goes far to support the district court's reasoning that Title VII caselaw must be consulted in considering the application of the Rehabilitation Act to uniformed military personnel .... Just as it would be incongruous to require persons claiming discrimination on grounds of sex, race, religion, or national origin - but not handicapped discrimination claimants - to follow Title VII procedures in suing federal employers, so it would be incongruous to allow uniformed military personnel to bring discrimination claims against the military based on handicap, when statutory claims based on sex, race, religion, or national origin are barred.

Doe v. Garret, 903 F.2d 1455, 1461 (11th Cir. 1990). The court of appeals also rejected Doe's due process claims.

REASONS FOR GRANTING THE WRIT

THE LOWER COURT DECIDED AN IMPORTANT QUESTION OF FEDERAL STATUTORY LAW, THE APPLICATION OF THE REHABILITATION ACT TO THE MILITARY, AS WELL AS AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW, BOTH OF WHICH CONFLICT WITH DECISIONS BY THIS COURT.

The court of appeals endorsed a military exception to the antidiscrimination provision of the Rehabilitation Act despite, first, no implicit or explicit legislative intent to do so, and second, despite the fact that the Congress explicitly chose to apply the remedies available under Title VI, rather than Title VII, to this provision of the Act. The appellate court thus applied a nonstatutory exception that only a few appellate courts have recognized in the narrow confines of Title VII, and applied it to a completely different Act. Even

more problematically, the court of appeals applied this nonstatutory military exception to a provision which explicitly rejects Title VII as an enforcement scheme. To reiterate, Congress chose in Section 794a(a)(1) of the Rehabilitation Act to adopt Title VII as the enforcement scheme for Section 791 of the Act; in sharp contrast, in Section 794a(a)(2) of the Act, which immediately follows, Congress chose Title VI as the enforcement model for Section 794 of the Act, its antidiscrimination provision. The legislative choice could hardly be clearer.

Thus, the court of appeals applied a nonstatutory exception to the Rehabilitation Act, an exception originating in a statute, Title VII, which Congress expressly chose not to apply to Section 794 of the Act. Only the Eleventh Circuit Court of Appeals has applied this

Title VII-based exception to Section 794 of the Rehabilitation Act. See Doe v. Garrett, 903 F.2d 1455 (11th Cir.1990); Smith v. Christian, 763 F.2d 1322 (11th Cir. 1985), See also Milbert v. Koop, 830 F.2d 354 (D.C. Cir. 1987) (recognizing military exception to the Rehabilitation Act, but not applying it).

Resolution of this question of statutory interpretation by this Court is necessary in light of previous Supreme Court decisions rejecting, indeed in the very context of the Rehabilitation Act, the mode of statutory interpretation employed by the lower court. In Consolidated Rail Corporation v. Darrone, 465 U.S. 624 (1984), for instance, this Court rejected a reading of Section 794 that would have incorporated a significant limitation found in Title VI. In Darrone, this Court refused to limit the reach of Section 794

to only those "employment practice[s] ... where a primary objective of the Federal financial assistance is to provide employment," (emphasis added), which is the language adopted in Title VI. Id. at 636. The Darrone Court observed that Section 794 of the Rehabilitation Act adopts the "remedies, procedures, and rights" of Title VI for "any recipient of Federal assistance." Id. at 635 (emphasis added). According to this Court, these terms do not incorporate the "primary objective" limitation of Title VI. Id. Indeed, "it would be anomalous to conclude that the section, designed to enhance the ability of handicapped individuals to ensure compliance with [Section 794] ..., silently adopted a drastic limitation on the handicapped individual's right to sue federal grant recipients for employment discrimination." Id. In short, Darrone

unequivocally rejected the application, to Section 794, of a statutory limitation found in Title VI, much less a nonstatutory limitation occasionally applied to Title VII.

Similarly, this Court, in Alexander v. Choate, 469 U.S. 287 (1985), refused to apply another limitation imposed upon in Title VI to Section 794 of the Rehabilitation Act. In Guardians Association v. Civil Service Commission of New York City, 463 U.S. 582 (1983), this Court held that a private right of action exists for the enforcement of Title VI. Id. at 594, citing Cannon v. University of Chicago, 441 U.S. 677 (1979). The Guardians Association Court, however, also recognized a limitation on Title VI, namely, that only instances of intentional discrimination may be enforced under the statute. In Alexander, this Court refused

to apply this limitation on Title VI to Section 794 of the Rehabilitation Act, despite the adoption, in Section 794a(a)(2), of Title VI "remedies, procedures, and rights." Together, Darrone and Alexander make clear that this Court will not hastily engraft upon Section 794 of the Rehabilitation Act limitations found in Title VI, much less wholesale exceptions imposed upon Title VII.

The court of appeals displayed discomfort with the notion that military personnel alleging discrimination on the basis of handicap should be entitled to press their claims, where some courts have rejected Title VII claims by military personnel that they suffered discrimination on the basis of race, gender, ethnicity, and religion. Yet the court of appeals disregards a fundamental distinction between Title VII and the Rehabilitation

Act. Only the latter statute acknowledges in some cases that discrimination is permissible, if a handicapped person absolutely cannot perform a job duty. Congress, in other words, has built in a statutory mechanism that would ensure that Executive agencies like the military are authorized to discriminate against handicapped individuals if they cannot perform their duties. Of course, the Act creates a number of safeguards to ensure that only those handicapped individuals who clearly cannot fulfill their duties are excluded. As this Court explained in School Board of Nassau County v. Arline, 480 U.S. 273 (1987), for instance, to determine whether a handicapped individual is "otherwise qualified" under Section 794 requires an "individualized inquiry." Id. at 287. According to the Arline Court:

> "An 'otherwise qualified' person is one who is able to meet all of a program's requirements in spite of his handicap." Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979). In the employment context, an otherwise qualified person is one who could perform "the essential functions" of the job in question. 45 C.F.R. §84.3(k) (1985). When a handicapped person is not able to perform the essential functions of the job, the court must also consider whether any "reasonable accommodation" by the employer would enable the handicapped person to perform those functions. Id.

Id. at 287, n.17.

In short, the Navy, if Doe were not "otherwise qualified," could legitimately discharge him solely on the basis of testing positive for the Human Immunodeficiency Virus. This explicit statutory authorization of discrimination in certain instances is what distinguishes the Rehabilitation Act from Title VII. Federal agencies are absolutely barred

under Title VII from discriminating on the basis of race, gender, ethnicity, and religion; in contrast, the Rehabilitation Act proscribes discrimination only if an individual is otherwise qualified to perform a job duty. All evidence produced at the district court indicated that Doe performed admirably as a canvasser-recruiter, with his handicap having absolutely no detrimental effect on his ability to fulfill his duties. The Rehabilitation Act is different from Title VII, because while it proscribes discrimination, it also affords federal agencies and recipients of federal funds sufficient flexibility to determine the qualification of handicapped individuals for various job duties, and indeed the right to exclude those individuals completely if not otherwise qualified.

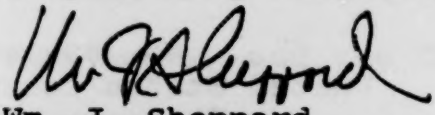
Similarly, the decision of the court of appeals rejecting Doe's constitutional claims conflicts with well-settled case authority. Ten days after Doe enlisted as a Navy recruiter, the Navy issued a regulation explicitly mandating that asymptomatic HIV-positive personnel be "retained in service."

Eighteen months later, however, while Doe was still serving his two year term, the Secretary of Defense reversed this policy. The court of appeals rejected Doe's claim that his discharge under the authority of the second regulation deprived him of protected liberty and property interests, created by the initial regulation, without due process. The court's conclusion in this regard is erroneous as well.

CONCLUSION

For the reasons described above, the petition for writ of certiorari should be granted.

Respectfully submitted.



Wm. J. Sheppard
Sheppard & White, P.A.
215 Washington Street
Jacksonville, FL 32202
(904) 356-9661

November 16, 1990

APPENDIX

John DOE, Plaintiff-Appellant,
v.
H. Lawrence GARRETT, III, as Secretary of the Department of the Navy, and J.W. Harris, as Commanding Officer, Naval Air Reserve, Jacksonville, Defendants-Appellees.

No. 89-3404.
United States Court of Appeals,
Eleventh Circuit.

June 25, 1990.

Before KRAVITCH and JOHNSON, Circuit Judges, and KAUFMAN*, Senior District Judge.

JOHNSON, Circuit Judge:

Plaintiff John Doe appeals from the district court's grant of summary judgment for the defendants, Secretary of the Navy

*Honorable Frank A. Kaufman, Senior U.S. District Judge for the District of Maryland, sitting by designation.

William L. Ball, III, and Captain J.W. Harris, USNR-TAR,[1] Commanding Officer of the Naval Air Reserve in Jacksonville, Florida ("the Navy"), in Doe's suit against the Navy under the Rehabilitation Act of 1973, 29 U.S.C.A. §§ 791, 794, 794a (West 1985 & Supp.1989) ("the Act"), and the Due Process Clause of the Fifth Amendment.

I. STATEMENT OF THE CASE

Doe enlisted in the Navy in 1972, and served, with a short break in 1975, until 1977. He reenlisted in the Naval Reserve in 1981 and was discharged on January 16, 1985. On July 13, 1985, he reenlisted in the Naval Reserve for a two-year term and was accepted into the Naval Reserve Canvasser Recruiter ("NRCR") program, as a temporary active-duty officer assigned to

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[1] United States Naval Reserve, Training and Administration of Reserves.

assist recruiting efforts. Doe reported for duty in the NRCR program at Jacksonville, Florida on November 25, 1985. He received excellent ratings in the NRCR program, and his initial term of service was extended from may 31, 1986 to September 30, 1986. His performance evaluation indicated that he "display[ed] outstanding potential to be a truly dynamic recruiter," and that he was "conscientious, enthusiastic and highly motivated." Doe was subsequently recommended for an extension of temporary active duty through September 30, 1987, which was tentatively approved by Naval Military Personnel Command ("NMPC") on July 8, 1986.

On July 20, 1986, Doe was admitted to the Naval Hospital at Portsmouth, Virginia, following the tragic news that he had tested positive as a carrier of the AIDS virus (also known as Human Immunodeficiency Virus or "HIV"). He did not, however, show

any symptoms of AIDS itself. [2] On August 26, 1986, Doe was informed by NMPC that, because of his AIDS infection, he would not be allowed to continue on active duty beyond September 30, 1986. On August 27, 1986, the Navy nevertheless allowed Doe to accept his previously-approved extension of temporary active duty through September 30, 1987. Later the same day, however, following receipt of a message from NMPC, this extension was cancelled. On September 30, 1986, Doe was released from active duty and returned to inactive status in the Naval Reserve. His final performance evaluation was again very favorable.

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[2] In September 1986, Doe was hospitalized briefly with a possible symptom of AIDS. This symptom disappeared, however, and he was released on September 16, 1986. His physician certified that there was "medically no reason for [Doe] to be separated from the Navy at this time." So far as the record before this Court reveals, Doe has not subsequently developed

(Footnote Continued)

At the time Doe tested HIV-positive and was released from the NRCR program, the governing Navy regulation, Secretary of the Navy Instruction 5300.30, dating from December 4, 1985 ("the 1985 regulation"), provided that Naval personnel infected with AIDS but showing no symptoms of the disease should be "retained in service." On April 20, 1987, however, this regulation was superseded by a Secretary of Defense Memorandum ("the 1987 regulation") providing that Naval Reserve personnel infected with AIDS were ineligible for active duty status for period exceeding thirty days, except under conditions of mobilization.[3]

(Footnote Continued)
symptoms of AIDS or AIDS-related complex itself.

[3] Furthermore, two naval messages from the Chief of Naval Operations, dated April 3, 1987 and June 2, 1987, provided that HIV-positive reserve personnel were
(Footnote Continued)

Doe brought suit in the district court on September 22, 1986, challenging his scheduled release from active duty in the NRCR program. The court ordered Doe to exhaust his administrative remedies, and he applied to the Navy's Board of Corrections of Naval Records ("BCNR") in November 1986. On September 14, 1987, the BCNR found that Doe's release from active duty violated the Navy's 1985 regulation, and recommended correction of Doe's records and an award of back-pay commensurate with active-duty status through September 30, 1987. The BCNR also recommended that Doe's enlistment in the Naval Reserve be extended through October 12, 1987. The Secretary of the Navy adopted the BCNR's recommendation on March 15, 1988. Doe thereafter returned to

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(Footnote Continued)
ineligible for recall or assignment to active duty, and indeed that a negative HIV-antibody test was required for such recall or assignment.

the district court, contending that the relief granted by the Navy was inadequate and that (1) the Navy's exclusion of him from reenlistment in the NRCR program on grounds of his AIDS infection violated the Rehabilitation Act, (2) the Navy had an obligation under the Act to implement an affirmation action plan for personnel handicapped by AIDS, (3) he was entitled to damages and injunctive relief [4] for the Navy's alleged violation of his due process rights in connection with this 1986 release from active duty and his prospective exclusion from the NRCR program, and (4) he was entitled to attorney's fees and costs.

On May 4, 1989, the district court entered summary judgment denying Doe all relief. Doe v. Ball, 725 F.Supp.1210

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[4] Doe's counsel, at the conclusion of oral argument, indicated that Doe had abandoned any claim for damages in this (Footnote Continued)

(M.D.Fla.1989). The court found that (1) the Rehabilitation Act did not apply to uniformed members of the armed services such as Doe, (2) the court was precluded from reviewing the constitutional validity of the Navy's personnel decisions as to Doe under Mindes v. Seaman, 453 F.2d 1997 (5th Cir.1971), and that, even if review were not precluded, Doe had failed to establish a deprivation of any constitutionally-protected property or liberty interest, and (3) Doe was therefore not entitled to attorney's fees and costs. Doe appeals to this Court, contending that the district court erred in its conclusions on the Rehabilitation Act and due process issues, and raising for the first time the argument that the Navy is equitably estopped from refusing to reenlist him in

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(Footnote Continued)
regard and sought only injunctive relief on this claim. See Part II(B) below.

the NRCR program. The questions presented are issues of law subject to de novo review.

II. ANALYSIS

A. The Rehabilitation Act

The district court held that Doe "has no remedy under the Rehabilitation Act," Doe, 725 F.Supp. at 1214, relying on well-established caselaw excluding uniformed military personnel from protection under Title VII of the Civil Rights Action of 1964, 42 U.S.C.A. §2000e-16 (West 1981). See Stinson v. Hornsby, 821 F.2d 1537, 1539, 1541 (11th Cir. 1987), cert. denied, __U.S.__, 109 S.Ct. 402, 102 L.Ed.2d 390 (1988); accord Roper v. Department of the Army, 832 F.2d 247, 248 (2d Cir. 1987); Gonzalez v. Department of Army, 718 F.2d 926,927-29 (9th Cir. 1983). The district court also held that, "[p]ursuant to the remedial scheme of Title VII, a private action

[under the Rehabilitation Act] may not be commenced until administrative remedies are exhausted." Doe, 725 F.Supp. at 1213 n. 6. The court noted that Doe's proceedings before the BCNR satisfied this requirement. Id.[5] Although the district court did not specifically address the issue, we note that it is well established that infection with AIDS constitutes a handicap for purposes of the Act. See Martinez v. Hillsborough County School Board, 861 F.2d 1502, 1506 (11th Cir.1988); see also Nassau County School Board v. Arline, 480 U.S. 273, 107 S.Ct. 1123, 94 L.Ed.2d 307 (1987). Doe argues that the district court erred by relying on Title VII caselaw because

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[5] While the Navy argued before the district court that Doe had not exhausted before the BCNR his claim for prospective reenlistment in the NRCR program, the Navy abandons any claim in this regard on appeal. It appears obvious that Doe sought from the BCNR all the relief which the BCNR could conceivably have granted him.

section 794(a)(2) of the Act makes available to claimants under section 794 the "remedies, procedures, and rights" of Title VI of the Civil Rights Act of 1964, 42 U.S.C.A. §2000d (West 1981). While Doe's argument might appear at first glance to have merit, we conclude that the district court's conclusion was correct.

An outline of the statutory framework is necessary to place the issue in context. Section 794(a) of the Rehabilitation Act [6] provides:

> No otherwise qualified individual with handicaps in the United States...shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any

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[6] This section is frequently referred to as "section 504" of the Act, according to the section designation in the original legislation.

Executive agency or by the United States Postal Service.

Section 791 of the Act[7] imposes an obligation on federal agencies to promulgate affirmative action plans assuring "adequate hiring, placement, and advancement opportunities for individuals with handicaps." 29 U.S.C.A. §791(b). The substantive scope of section 791 thus goes well beyond the simple nondiscrimination requirement of section 794(a). See Southeastern Community College v. Davis, 442 U.S. 397, 410-13, 99 S.Ct.2361, 2369-70, 60 L.Ed.2d 980 (1979). Prior to 1978, however, section 794(a) did not afford federal employees any private right of action.

Congress amended the Act in 1978 to include the reference in section 794(a) to

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[7] This section is frequently referred to as "section 501" of the Act. See not 6, supra.

"Executive agenc[ies]" and the Postal Service, thereby "extend[ing] [its] proscriptions...to activities of the federal government." See Treadwell v. Alexander, 707 F.2d 473,475 (11th Cir. 1983); Rehabilitation Amendments of 1978, P.L. 95-602, §119, 92 Stat. 2955, 2982. The 1978 amendments also enacted section 794a(a) of the Act, which states:

> (a)(1) The remedies, procedures, and rights set forth in [Title VII, 42 U.S.C.A. §2000e-16]...shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under [section 791], a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable an appropriate remedy.
>
> (2) The remedies, procedures, and rights set forth in [Title VI of the Civil Rights Act of 1964, 42 U.S.C.A. §2000d],

> shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

See P.L. 95-602, §120, 92 Stat. 2955, 2982-83. As this Court noted in Treadwell, 707 F.2d at 475, section 794a(a)(1) "created a private right of action under [section 791] in favor of persons subjected to handicap discrimination by employing agencies of the federal government." This private right of action, by its very terms, incorporated Title VII's requirement of exhaustion of administrative remedies.

Section 794a(a)(2), on the other hand, reflects the fact that section 794 is fundamentally modeled after Title VI. See Alexander v. Choate, 469 U.S. 287, 293 n.7, 105 S.Ct. 712, 716 n.7, 83 L.Ed.2d 661 (1985). This Court's predecessor first held that Title VI created an implied private cause of action in Bossier Parish

School Board v. Lemon, 370 F.2d 847, 852 (5th Cir.) (Wisdom, J.), cert. denied, 388 U.S. 911, 87 S.Ct.2116, 18 L.Ed.2d 1350 (1967), and we held likewise with regard to section 794 in Helms v. McDaniel, 657 F.2d 800, 806, n. 10 (5th Cir. Unit B 1981), cert. denied, 455 U.S. 946, 102 S.Ct. 1443, 71 L.Ed.2d 658 (1982). See also Camenisch v. University of Texas, 616 F.2d 127, 131 (5th Cir.1980) (Tuttle, J.), vacated on other grounds, 451 U.S. 390, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981). Furthermore, it is established, as a general matter, that Title VI-and by extension section 794-does not incorporate Title VII's requirement of exhaustion of administrative remedies. See Milbert v. Koop, 830 F.2d 354, 356 (D.C.Cir.1987) (Frank A. Kaufman, J., sitting by designation); Cheyney State College Faculty v. Hufstedler, 703 F.2d 732, 737 (3d Cir.1983); Miener v. Missouri, 673 F.2d 969, 978 & n. 10 (8th Cir.)

(Henley, Jr.), cert. denied, 459 U.S. 909, 916, 103 S.Ct. 215, 74 L.Ed.2d 171 (1982); Camenisch, 616 F.2d at 133-36. The 1978 Amendments thus posed the question whether handicapped persons bringing Rehabilitation Act claims against federal government employers could proceed under the direct, Title VI-style cause of action available to all other claimants under section 794a(a)(1), with its incorporation of Title VII's administrative exhaustion requirement.

The present Fifth Circuit, in Prewitt v. United States Postal Service, 622 F.2d 292, 302-04 (5th Cir. Unit A 1981),[8] held that in order to accommodate Congress's

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[8] Prewitt was decided by Unit A of the Fifth Circuit on November 5, 1981, subsequent to the October 1, 1981 circuit split, and is therefore not binding precedent on this Court. See Treadwell, 707 F.2d at 475 n. 4; Stein v. Reynolds Securties, Inc., 667 F.2d 33, 34 (11th Cir. 1982)

intent in enacting the 1978 amendments, it was necessary to impose the section 791/Title VII exhaustion requirement on federal employees bringing actions under section 794. Several circuits have gone further and held that private actions against federal employers may not be brought under section 794 at all, but only pursuant to section 791 and the Title VII remedies of section 794a(a)(1). See Johnston v. Horne, 875 F.2d 1415, 1420-21 (9th Cir. 1989), and cases cited therein (7th, 9th, and 10th Circuits). Those circuits which, like Prewitt, have found that section 794 affords a private right of action to federal employees have nevertheless agreed with Prewitt that such claimants must satisfy the section 794a(a)(1) procedures. See Milbert, 830 F.2d at 357, and cases cited therein (5th,

6th and 8th Circuits).[9] The basic rationale for the approach taken by these courts, as stated by the Seventh Circuit, is that, because Title VII is the exclusive remedy for federal government discrimination on grounds of race, religion, sex, or national origin, "we...cannot believe that...Congress could have wanted us to interpret the Act as allowing the handicapped-alone among federal employees or job applicants complaining of discrimination - to bypass the administrative remedies in Title VII." McGuinness v. United States Postal Service, 752 F.2d 1318, 1322 (7th Cir. 1984); see

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[9] The D.C. Circuit in Milbert, while agreeing with Prewitt that exhaustion was required under either section 791 or 794, declined to decide whether a claimant suing a federal agency could proceed under section 794 at all. The court "strongly suggest[ed]," however, that such a claimant "seek relief under section [791] rather than under section [794]." 830 F.2d at 357.

also Boyd v. United States Postal Service, 752 F.2d 410, 413-14 (9th Cir.1985).

Support for this conclusion is also found in the language of section 794a(a)(2), which applies Title VI remedies and procedures only to claimants suing "any recipient of Federal assistance or Federal provider of such assistance under section 794." This would seem to encompass private or state recipients of federal funds and their federal providers, but not federal agencies themselves. See Morgan v. United States Postal Service, 798 F.2d 1162, 1165 (8th Cir. 1986), cert. denied, 480 U.S. 948, 107 S.Ct. 1608, 94 L.Ed.2d 794 (1987). While this Court has not yet explicitly decided this issue we have cited Prewitt with approval and have noted that "we look to it for guidance." Treadwell, 707 F.2d

at 475 & n. 4.[10] For the reasons stated in Prewitt and discussed above, we take this opportunity to explicitly adopt Prewitt's holding that private actions against federal government employers under the Act, whether brought under section 791 or 794, must satisfy "the requirement of exhaustion of administrative remedies in the manner prescribed by section [794a(a)(1)] and thus by Title VII." Milbert, 830 F.2d at 357.

We think this conclusion goes far to support the district court's reasoning that Title VII caselaw must be consulted in considering the application of the Rehabilitation Act to uniformed military

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[10] Treadwell appeared to adopt, at least by implication, Prewitt's holding that a cause of action against federal employers existed under section 794. See Treadwell, 707 F.2d at 475 (noting that the plaintiff had "brought suit under §§ [791] and [794]"). We concur in that implication and hereby make it explicit. Treadwell did not, however, address the exhaustion of remedies issue.

personnel. The reasons underlying the Title VII "military exception" have been well stated by Judge Fletcher for the Ninth Circuit in Gonzalez, 718 F.2d at 927-29, and need not be repeated here. See also Johnson v. Alexander, 572 F.2d 1219, 1223-24 (8th Cir.) (Henley, J.), cert. denied, 439 U.S. 986, 99 S.Ct. 579, 58 L.Ed.2d 658 (1978). As noted above, this Court has adopted that exception. Stinson, 821 F.2d at 1539, 1541. Just as it would be incongruous to require persons claiming discrimination on grounds of sex, race, religion, or national origin - but not handicapped discrimination claimants - to follow Title VII procedures in suing federal employers, so it would be incongruous to allow uniformed military personnel to bring discrimination claims against the military based on handicap, when statutory claims based on sex, race, religion, or national origin are barred.

Any doubt we might entertain on this issue is dispelled by Smith v. Christian, 763 F.2d 1322 (11th Cir. 1985), in which this Court rejected a section 794 claim brought against the Navy by an individual who was denied a commission in the Naval Reserve Medical Service Corps because he was missing his right index finger. Without addressing the issue whether the claimant had a cause of action against the military under section 794 to being with,[11] Smith found that section 794 did not override the Navy's countervailing statutory authority to prescribe physical

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[11] We did not address that issue in Smith because the district court did not; the district court granted summary judgment for the Navy on different grounds, which this Court upheld on appeal. See Smith v. United States Navy, 573 F.Supp. 1361, 1364 (S.D.Fla.1983), aff'd 763 F.2d 1322 (11th Cir.1985). Smith did, however, cite "generally" to the Eighth Circuit's decision in Johnson v. Alexander, supra, which articulated the "military exception" to Title VII. See Smith, 763 F.2d at 1325.

qualifications for enlistees, an area over which we found "Congress has given the Executive Branch wide latitude." Smith, 763 F.2d at 1325. Smith found the Navy's authority specifically rooted in two statues, 10 U.S.C.A. § 591(b) (West 1983) and 10 U.S.C.A. § 5579(a) (West 1959). See Smith, 763 F.2d at 1324 & n. 3. Only the former applies here.[12] It states: "Except as otherwise provided by law, the Secretary concerned shall prescribe physical, mental, moral, professional and age qualifications for the appointment of persons as Reserves of the armed forces under his jurisdiction." Doe understandably focuses

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[12] Section 5579 applied only to the Navy's Medical Service Corps and was repealed effective September 15, 1981. See Defense Officer Personnel Management Act of 1980, P.L. 96-513, §§321, 701(a), 94 Stat. 2835, 2892, 2955. Section 5579 was relevant in Smith because the claimant there had applied and been rejected prior to its repeal. See Smith, 573 F.Supp. at 1362-63, 1366.

on the opening phrase, which Smith did not recite, and argues essentially that Smith reached the wrong conclusion. Whatever the strength of Smith's reasoning, however, we are bound by it as precedent.[13] We note that the disputed language might plausibly be read simply to denote that entities other than the "Secretary concerned" might be authorized by law to prescribe qualifications for the Reserves, rather than to suggest substantive limitations on those qualifications. We believe Smith supports, a fortiori, the Navy's exclusion of Doe from reenlistment in the NRCR program.

For the foregoing reasons we agree with the district court that Doe has no remedy under the Rehabilitation Act.

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[13] Only the en banc Court may overrule a prior panel decision. See United States v. Machado, 804 F.2d 1537, 1543 (11th Cir. 1986).

B. The Due Process Clause

It is unclear from Doe's brief on appeal whether his due process claim relates to his release from the NRCR program in 1986, his exclusion from reenlistment in the program subsequent to September 30, 1987, or both. The district court found that the BCNR had already afforded Doe complete relief for the 1986 relief, and thus focused primarily on his reenlistment claim. See Doe, 725 F.Supp. at 1216. At the conclusion of oral argument before this Court, Doe's counsel stated that Doe now seeks only injunctive relief on the due process claim, not damages. Because it is clear that there is no conceivable injunctive remedy which could provide any relief for Doe's 1986 release beyond that already granted by the BCNR, Doe's only remaining due process claim before this Court relates to his

exclusion from reenlistment in the NRCR program.

The Navy's refusal to reenlist Doe in the NRCR program does not impinge on any constitutionally-protected property interest. It is well established that a military officer's expectation of continued military employment does not rise to the level of a property interest unless it is rooted in some statute, regulation, or contract. Sims v. Fox, 505 F.2d 857, 860-62 (5th Cir.1974) (en banc), cert. denied, 421 U.S. 1011, 95 S.Ct. 2415, 44 L.Ed.2d 678 (1975); accord Alberico v. United States, 783 F.2d 1024, 1026-27 (Fed.Cir.1986). In this cause, as we have noted in Part I, the applicable military regulations in effect since April 1987 specifically exclude Doe from eligibility for the NRCR program because of his HIV-positive status. More generally, the Navy's regulations governing the NRCR

program, as set forth in Naval Military personnel Command Instruction 1001.1B, provide that assignments to the NRCR program are for temporary periods of 180 days, one year, or two years, that retention beycnd the initial period "is not implied or guaranteed," and that the NRCR program "is not a career program." Assignments and reassignments to the program are made by the Commander of the Naval Military Personnel Command from among applicants meeting a detailed list of requirements; nothing in the regulations suggests any vested right or assurance that any applicant will be accepted into the program. To the contrary, the regulations specifically warn that even incumbent NRCR officers "may be non-continued... in accordance with the needs of the Naval Reserve Recruiting Program." Courts have rejected claimed property interests even in cases involving out-right discharge from

career positions in the military. See Sims, 505 F.2d at 858-60; Alberico, 783 F.2d at 1026-27. Accordingly, Doe's claim to a property interest in prospective reassignment to the NRCR program is devoid of merit.

Doe's claim to a protected liberty interest is equally devoid of merit. It is established that discharge or termination of a government employee on the basis of false and stigmatizing reasons publicized by the governmental employer implicates a protected liberty interest in the employee's reputation and ability to gain future employment. See Buxton v. Plant City, 871 F.2d 1037, 1042-43 (11th Cir.1989).[14] A critical element of a claimed invasion of a reputational liberty

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[14] The district court thus erred in holding, on the basis of Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (Footnote Continued)

interest, however, is the falsity of the government's asserted basis for the employment decision at issue. See Codd v. Velger, 429 U.S. 624, 627, 97 S.Ct. 882, 883, 51 L.Ed.2d 92 (1977); Buxton, 871 F.2d at 1042 & n.4. Doe has never disputed that he does in fact carry the AIDS virus, the basis for the Navy's disputed "employment decisions" in this case. Because he does not claim falsity, he has failed to raise any "factual dispute... which has some significant bearing on [his] reputation." Codd, 429 U.S. at 627, 97 S.Ct. at 884.

(Footnote Continued)
(1976), that an allegation of damage to reputation accompanying wrongful discharge "is insufficient to state a constitutional claim." Doe, 725 F.Supp. at 1217. Paul involved a claimed liberty interest resting on reputation alone, unconnected to any governmental employment action. See Paul, 424 U.S. at 709-10, 96 S.Ct. at 1164-65; cf. Green v. Brantley, 895 F.2d 1387, 1393 (11th Cir. 1990) ("[reputational] liberty interest curvives even where...the withdrawal of employment does not impinge on a recognizable property interest").

Because Doe's due process claim so clearly fails on the merits, we need not consider at any length the district court's initial finding that Doe's claim is unreviewable under Mindes v. Seaman, 453 F.2d 197, 201-02 (5th Cir.1971), which set forth a four-part balancing test governing the judicial reviewability of constitutional challenges to military personnel decisions. Cf. Stinson, 821 F.2d at 1540-41 (district court must apply Mindes analysis before reaching merits of constitutional claim).[15] We find nothing objectionable in the district court's

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[15] This Court in Stinson took the rather severe approach of reversing and remanding the distrct court's dismissal on the merits of a constitutional claim because the district court had not applied Mindes to determine whether the claim was reviewable in the first place. We reversed despite the fact that the issue on the merits was quite simple, the district court's disposition appeared plainly correct, and the district court's

(Footnote Continued)

application of Mindes, and we think it clear that under Mindes factors one and

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(Footnote Continued)
consideration of Mindes on remand could not possibly have led to a different result. See Stinson, 821 F.2d at 1541-43 (Henderson, J., specially concurring) (criticizing Mindes and suggesting disposition of plainly meritless consitutional claims "without resort to the cumbersome Mindes analysis"); accord Watson v. Arkansas National Guard, 886 F.2d 1004, 1009-10 (8th Cir. 1989)

We note that despite the apparent assumption of Stinson, this Court and its predecessor have not always applied Mindes in constitutional challenges to military personnel decisions. The former Fifth Circuit, for example, failed to apply Mindes in Sims v. Fox, supra, decided only three years after Mindes. Furthermore, while Mindes refers to statutory as well as constitutional claims, it appears well established that Mindes need not be applied before reaching the merits of a statutory claim against the military. See Stinson, 821 F.2d at 1539-40; Smith, 763 F.2d at 1324-25 (both rejecting statutory claims without resort to Mindes analysis). It would obviously be inappropriate for the federal courts to second-guess whatever balancing of policy interests might underlie a decision by Congress to subject the military to liability under a legal standard going beyond constitutional requirements. Such balancing by the courts is appropriate and often necessary with regard to constitutional claims, however,
(Footnote Continued)

three, at least,[16] review of Doe's due process claim in this case is disfavored.

C. Equitable Estoppel

Doe raises for the first time before this Court the argument that the Navy's past conduct toward him equitably estops it from denying him prospective reassignment to the NRCR program, relying heavily on the Ninth Circuit's recent decision in Watkins v. United States Army, 875 F.2d 699 (9th Cir. 1989) (en banc). Because Doe failed to raise this contention before the

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[16] Factor one relates to "[t]he nature and strangth of the plaintiff's challenge to the military determination," and notes that "[a]n obviously tenuous claim of any sort must be weighted in favor of declining review." Mindes, 453 F.2d at 201. Factor three relates to "[t]he type and degree of anticipated interference with the military function." Id. It is obvious that finding a protected property interest in not being denied acceptance to a military program such as the NRCR program - with the presumptive consequence of requiring some kind of due process hearing for every rejected applicant - would (Footnote Continued)

district court, we need not address it on appeal. Cf. In re Daikin Miami Overseas, Inc. 868 F.2d 1201, 1207 (11th Cir. 1989) (issue not raised below may be considered where "pure question of law" is involved and refusal to consider it "would result in a miscarriage of justice"). In the interest of responding fully to all aspects of Doe's claim, however, we note that Doe's analogy to Watkins is strained indeed. In Watkins, the Army had refused to reenlist a career soldier with an outstanding record solely on the basis of his admitted homosexuality, despite the fact that the Army had repeatedly reenlisted him over the previous fifteen years, in violation of its own regulations and with full knowledge of his homosexual orientation, which he had candidly and repeatedly acknowledged over

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(Footnote Continued)
threaten substantial interference with the military's personnel selection processes.

the years. See Watkins, 875 F.2d at 701-03. The Ninth Circuit held that the Army had induced Watkin's reliance on its previous course of conduct and was therefore equitably estopped from refusing to reenlist him. See id., at 709-11. In this case, by contrast, Doe has never relied to his detriment on any violation by the Navy of its own regulations. Doe challenged the Navy's termination of his NRCR assignment in 1986 as being in violation of the 1985 regulation, and the BCNR ultimately agreed that under that regulation Doe was entitled to serve out his term through September 30, 1987. Thereafter, the Navy has refused to reenlist Doe in the NRCR program, in accordance with its 1987 regulation. Unlike the situation in Watkins, the Navy has never led Doe to believe that he has any expectation of serving in the NRCR program in violation of the regulations

excluding HIV-positive individuals. Doe's estoppel claim thus lacks merit.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court.

John DOE, Plaintiff,
v.
William L. BALL, III, as Secretary of the Navy, et al., Defendants.

No. 86-971-Civ-J-16
United States District Court,
M.D. Florida,
Jacksonville Division.
May 4, 1989.

OPINION

JOHN H. MOORE, II, District Judge.

This matter is before the court for final resolution. The defendants, the Honorable William L. Ball, III, the Secretary of the Navy, and Captain J.W. Harris, USNRTAR,[17] the Commanding Officer of the Naval Air Reserve in Jacksonville, Florida, (Navy),[18] filed a motion to dismiss this cause for failure to state a

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[17] "USNR" is the abbreviation for United States Naval Reserve. "TAR" refers to the Training and Administration of Reserves program, which is concerned with the administration and training of reserve components.

(Footnote Continued)

claim pursuant to Fed.R.Civ.P. 12(b)(6). At the final pretrial conference, held on 21 December 1988, the parties indicated to the Court that there were no disputes of material fact and that the case should be amenable to summary judgment. Accordingly, at the Court's direction, the parties filed a statement of stipulated facts and submitted memoranda thereon. After a careful consideration of the stipulated facts, legal memoranda, the relevant pleadings and applicable law, the Court determines that summary judgment is appropriate.

(Footnote Continued)
[18] Originally, this suit was filed naming then Secretary of the Navy John F. Lehman, and then Commanding Officer of the Naval Air Reserve in Jacksonville, Florida, Captain R.E. Webb, as defendants. Since the filing of this suit, there has been a succession of other persons occupying these offices. The plaintiff's suit is unaffected by these changes as it is one essentially against the United States. Therefore, the defendants will be
(Footnote Continued)

The plaintiff, filing suit under the pseudonym of John Doe, brought this case on 22 September 1986, claiming that his scheduled release from active duty as a Naval Reserve Canvasser Recruiter on 30 September 1986, would violate his rights under the Federal Rehabilitation Act, 29 U.S.C. §§ 791(b), 794 and 794(a), and under the due process clause of the Fifth Amendment. Mr. Doe contended that his release was predicated on the fact that he had tested positive for the HTLV-III antibody (HIV).[19] Simultaneously, Mr. Doe filed a motion for a preliminary injunction requesting this Court to enjoin the Navy

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(Footnote Continued)
collectively referred to in this opinion as the Navy.

[19] HTLV-III is the abbreviation for Human T-Lymphotropic Virus III. Presently, it is referred to as Human Immunodeficiency Virus (HIV) antibodies. The antibody is produced by the human body as a response to Acquire Immune Deficiency Syndrome (AIDS).
(Footnote Continued)

from releasing him. After a hearing on Mr. Doe's motion the Court declined to impose a preliminary injunction and stayed the progression of the case pending his exhaustion of administrative remedies. Mr. Doe then filed an Application for Correction of Military or Naval Record under the provisions of 10 U.S.C. § 1552. At the conclusion of proceedings before the Board for Correction of Naval Records (BCNR), Mr. Doe returned to this Court.

Mr. Doe has a long history of service with the Navy. He first enlisted in the Navy on 30 March 1972, and served continuously, except for a brief period in 1975, until 21 April 1977, at which time he was discharged. Mr. Doe returned to the Navy in January 1981, when he reenlisted in the Naval Reserve as part of the TAR

(Footnote Continued)
HTLV-III and HIV will be used interchangeably throughout this opinion.

program. Mr. Doe served on active duty until his discharge in January 1985. On 13 July, 1985, Mr. Doe reenlisted in the Naval Reserve for a two-year term, applying for acceptance into the Naval Reserve Canvasser Recruiter Program under the provision of NAVMILPERSCOM Inst. 1001.1B of 26 February 1985.[20]

The Canvasser Recruiter program is composed of Naval Reservists recalled to active duty in a temporary status (TEMAC) to assist in recruiting for the Naval Reserve. Under the program, Naval Reservists are assigned to active duty in the geographic area in which they live so they may take advantage of their familiarity with the locale, and to conserve travel and transfer funds. The Navy accepted Mr. Doe for this program and

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[20] NAVMILPERSCOM is an official
(Footnote Continued)

he reported for active duty at the Naval Air Reserve, Jacksonville, Florida, on 25 November 1985. Mr. Doe's initial orders allowed service for 187 days, ending 31 May 1986. These orders would be extended through 30 September 1986, provided his performance was satisfactory. Also, the Program provided for further continuations of the active duty period.

Mr. Doe performed his duties as a Canvasser Recruiter in an excellent manner, scoring a 3.8 on his performance evaluation of 31 March 1986, out of a possible 4.0. The reporting senior noted that Mr. Doe had recruited 11 individuals during the reporting period, and otherwise commented upon Mr. Doe's abilities in glowing terms. He recommended Mr. Doe for retention and advancement. Subsequently, Mr. Doe's

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(Footnote Continued)
abbreviation for Naval Military Personnel Command.

service as a Canvasser Recruiter was extended until 30 September 1986. Also, his underlying active duty status was extended to 30 September 1987, by Naval Military Personnel Command (NMPC).

On 20 July 1986, Mr. Doe was admitted to the Naval Hospital in Portsmouth, Virginia. This admission was necessary because he had tested positive for the presence of the HIV antibody. The physical examination performed disclosed that the presence of the antibody was his only symptom. Otherwise, he was in good health. On 22 August 1986, after Mr. Doe's return to Jacksonville, his commanding officer reported the positive test result for HIV to the Commander, Naval Reserve Force, via letter, pointing out his excellent record and the approved continuation of his active duty. He requested guidance concerning Mr. Doe's status. The Commander, Naval Reserve Force, notified NMPC of these developments.

On 26 August 1986, NMPC informed Mr. Doe that he would not be continued on active duty after 30 September 1986. Nevertheless, he was permitted to extend his agreement to remain on active duty and his Naval Reserve enlistment the very next day. These extensions would have continued his active duty until 30 September 1987, and his Naval Reserve enlistment until 13 September 1987. Later that same day, both extensions were cancelled after a message was received from NMPC. The Navy released Mr. Doe from active duty on 30 September 1986, returning him to the status of an inactive reservist. In his final performance evaluation Mr. Doe scored an overall rating of 3.8 and again received very favorable comments.

Prior to his release from active duty, Mr. Doe filed suit in this Court. As previously discussed, this Court denied Mr. Doe's request for a preliminary injunction,

directing him to first exhaust possible administrative remedies. Accordingly, Mr. Doe applied to the BCNR in November of 1986 to contest his release from active duty.

After a review of Mr. Doe's case, in light of the naval regulations then in effect, the BCNR found sufficient grounds of "error and injustice" to warrant a correction to his naval record in all appropriate places. The BCNR recommended that the correction reflect:

> A. That on 27 August 1986, Petitioner extended his enlistment in the Naval Reserve for a period of three months, and that this extension was not cancelled at any subsequent time. Such an extension would result in the expiration of Petitioner's enlistment of 12 October 1987.
>
> B. That on 27 August 1986, Petitioner extended his agreement to remain on active duty until 30 September 1987, that this extension was not subsequently cancelled, and that Petitioner served on active duty until the latter date, at which time he was released from active duty and transferred to the inactive reserve.

The BCNR concluded that the correction to the record would constitute sufficient relief. The Secretary of the Navy accepted the BCNR's recommendation on 15 March 1988.[21] Pursuant to the correction of his naval record, Mr. Doe was awarded the compensation to which he would have been entitled had he been allowed to continue on active duty until 30 September 1987.

On 7 April 1988, Mr. Doe filed his Third Status Report with this Court stating that the results obtained before the BCNR failed to provide him complete relief. Specifically, Mr. Doe claims that the following issues remain to be determined:

(a) his future as a Naval Canvasser Recruiter after 30 September 1987;
(b) whether the Navy has filed to

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[21] The entire administrative file of the Board for Correction fo Naval Records in this case was submitted to the Court and filed under seal.

complete implementation of an affirmative action plan for the physically handicapped and specifically for individuals who have tested positive for the HIV antibody;

(c) his damages for the deprivation of his right to due process; and

(d) his attorney's fees and costs.

On 9 December 1988, the Navy filed its motion to dismiss.

The first question this Court must consider is whether the Rehabilitation Act applied to uniformed members of the armed forces. The Act prohibits discrimination against individuals on the basis of a handicap "under any program or activity conducted by an Executive Agency...." 29 U.S.C. § 794. In addition, the Act requires each department, agency, and instrumentality within the executive branch to develop an affirmative action program for the hiring, placement and advancement of individuals with handicaps. 29 U.S.C. § 791(b). The Act is enforceable by private

individuals subjected to handicap discrimination by employing agencies of the federal government through the provisions of 29 U.S.C. § 794(a)(1), which expressly adopts the "remedies, procedures, and rights" found in section 717 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16 (Title VII). See Treadwell v. Alexander, 707 F.2d 473, 475 (11th Cir. 1983); Prewitt v. U.S. Postal Service, 662 F.2d 292, 304 (5th Cir. Unit A 1981).

The Court, therefore, in determining the appropriate scope to be given to the Act, must look to the remedial framework of Title VII.[22] 42 U.S.C. § 2000e-16(a) prohibits discrimination on the basis of race, color, religion, sex, or national

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[22] Pursuant to the remedial scheme of Title VII, a private action may not be commenced until administrative remedies are exhausted. Prewitt, at 304. The proceedings before the BCNR satisfy this requirement.

origin, affecting employees or applicants for employment in military departments. However, the courts of appeals which have considered the issue have concluded that the definition of military departments, as used in Title VII, does not include uniformed military personnel. Roper v. Dept. of Army, 832 F.2d 247 (2nd Cir.1987); Gonzalez v. Dept. of Army, 718 F.2d 926 (9th Cir.1983); Johnson v. Alexander, 572 F.2d 1219 (8th Cir.1978). Those courts have determined that Congress, when enacting Title VII, meant to distinguish between civilian employment in a "military department" and uniformed military personnel in the armed forces.

In Stinson v. Hornsby, 821 F.2d 1537 (11th Cir. 1987), the court had before it a claim by a discharged member of the Alabama National Guard alleging racial discrimination by the Department of the Army, and seeking relief under 42 U.S.C.

§§ 1981, 1983 and Title VII. The district court had dismissed Stinson's complaint holding that it failed to state a claim for relief. The Court affirmed that portion of the district court's opinion dismissing Stinson's Title VII claim. In analyzing Stinson's Title VII claim the Court made a distinction between civilian employees who were members of military departments and uniformed military personnel who were members of the armed forces. The Court concluded that Stinson was a member of the armed forces, and was therefore not covered by the provisions of Title VII. In so ruling, the Court wrote:

> Our holding today is that members of the National Guard are generally employees of the state; but where the facts indicate that the person is on full-time military duty and other factors indicate that the person is more military than civilian, no Title VII action may be brought.

Id. at 1541. In this case there can be no question that Mr. Doe was a member of the

armed forces. Title 10 U.S.C. § 101(4) defines armed forces to include the Navy. Title 10 U.S.C. § 5001(a) defines Navy as including the Naval Reserve. Since the parameters of the Rehabilitation Act are restricted by Title VII, and since Stinson holds that members of the armed forces have no cause of action under Title VII, the Court concludes that Mr. Doe has no remedy under the Rehabilitation Act.

In light of the above ruling that the Rehabilitation Act does not afford Mr. Doe any remedy, it is a matter of logical force for this Court to conclude that the affirmative action mandate of 29 U.S.C. § 791 does not extend to programs involving military personnel. Indeed, the Eleventh Circuit has held that Department of Defense regulations enacted pursuant to the Rehabilitation Act do not extend to programs related to the procurement of military personnel. Smith v. Christian,

763 F.2d 1322, 1325 (11th Cir.1985). Thus, the allegation that the Navy has failed to implement an affirmative action program for the physically handicapped, and specifically for individuals who have tested positive for the HIV antibody, fails to state a claim for relief.

Mr. Doe's final claim for relief is that the Navy deprived him of his right to due process of law under the Fifth Amendment by discharging him in violation of SECNAVINST 5300.30 dated 4 December 1985.[23] SECNAV Instruction 5300.30 is an internal regulation of the Department of the Navy setting forth policy regarding the "identification, surveillance and disposition of military members infected with HTLV-III." Section 2b(1) of the Instruction provides:

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[23] SECNAVINST is the official (Footnote Continued)

> Members who are HTLV-III antibody positive who demonstrate no evidence of progressive clinical illness or immunological deficiency shall be retained in naval service.

In addition, Section 8a provides:

> Military personnel who are antibody positive but manifest no evidence of progressive clinical illness or immunological deficiency (physical laboratory assessment, demonstration of ability to respond to immunizations, and ability to mount a protective immune response to immunizations or exposure to naturally occurring pathogens), shall be retained in service, unless some other reason for separation exists. This interim policy is based on the following considerations:
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> (1) There is no demonstrated risk of transmission of disease in normal daily activities.
> (2) An investment in training of these members has been made.
> (3) The condition may be incident to service.

(Footnote Continued)
abbreviation for Secretary of the Navy Instruction.

In its administrative proceedings the BCNR concluded that Mr. Doe had been released from the Navy as a result of testing positive for the HIV antibody. The Board found that such action violated the regulations set forth in SECNAVINST 5300.30 and recommended that Mr. Doe's record be corrected to reflect its findings. The Secretary of the Navy approved this recommendation, Mr. Doe's record was corrected, and he received the money that he would have made for the relevant time period. Now Mr. Doe, contending that the Board's recommendation and its approval afford him inadequate relief, argues that he should have been returned to active service after 30 September 1987.

Before this Court can review a military personnel decision, it must engage in the analysis outlined in Mindes v. Seaman, 453 F.2d 197 (5th Cir.1971), in order to determine whether Mr. Doe's

constitutional claim is barred. The Mindes approach was recently reaffirmed in Stinson. 821 F.2d at 1540. The Mindes inquiry compels an independent two-step process. First, this Court must look to see if Mr. Doe asserts:

> (a) an allegation of the deprivation of a constitutional right, or an allegation that the military has acted in violation of applicable statutes or its own regulations, and
> (b) exhaustion of available intraservice corrective measures.

Mindes, 453 F.2d at 201; Stinson, 821 F.2d at 1540. If this threshold inquiry cannot be satisfied then an internal military decision should not be reviewed.

Mr. Doe has alleged a deprivation of Fifth Amendment due process and a concomitant violation of the Navy's own regulations regarding persons who test

positive for the HIV antibody.[24] In addition, he has exhausted his administrative remedies by going before the BCNR. See 10 U.S.C. § 1552. Therefore, the initial phase of the Mindes test has been satisfied. The second part of the Mindes analysis requires this Court to conduct a weighing of the following four factors:

1. The nature and strength of the plaintiff's challenge to the military determination.
2. The potential injury to the plaintiff if review is refused.
3. The type and degree of anticipated interference with the military function.
4. The extent to which the exercise of military expertise or discretion is involved.

Mindes, 453 F.2d at 201; Stinson, 821 F.2d at 1540. The weighing of these factors is

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[24] The thrust of Mr. Doe's Fifth Amendment claim in Court III of the complaint is that the Navy violated its own rules when discharging him from active (Footnote Continued)

intended to aid district courts in evaluating the substance of the allegation "in light of the policy reasons behind nonreview of military matters." Mindes, 453 F.2d at 201.

Considering the first factor, the nature and strength of Mr. Doe's challenge, the Court concludes that it weighs in favor of the Navy. Mr. Doe's allegation that his Fifth Amendment due process rights have been violated is tenuous at best. It is true that the BCNR found that the Navy had violated its own regulations in September of 1986, and that Mr. Doe's record was corrected and he received compensation. However, this Court can discern no right of Mr. Doe's to continued active service after 30 September 1987, that has been violated. Under applicable regulations he cannot

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(Footnote Continued)
duty. See Response to Defendants' Motion to Dismiss, p.7, n.5.

serve additional periods of extended active duty as a result of his HIV positivity. A Secretary of Defense Memorandum dated 20 April 1987, provides that "[r]serve component members with serologic evidence of HIV infection are ineligible for extended active duty (duty for a period of more than 30 days) except under conditions of mobilization." Secretary of Defense Memorandum, at 7, para. c. 2 (appended to Defendant's Motion to Dismiss or, in the Alternative, Motion for Summary Judgment as Exhibit A). This memorandum effectively supersedes any policy to the contrary contained in SECNAVINST 5300.30. Moreover, that Instruction expressly states that it is an interim policy. Also, Mr. Doe was ineligible to reapply for the Naval Reserve Canvasser Recruiter program after 30 September 1987, because of an insufficient amount of obligated time remaining on his underlying enlistment. Mr. Doe's

underlying enlistment expires on 12 October 1987. NMPC Instruction 1001.1B provides that personnel applying for the Canvasser Recruiter program must "[h]ave sufficient obligated service (at least 9 months from application date) to perform the requested period of active duty." Thus the nature and strength of Mr. Doe's challenge weighs in favor of the Navy.

The second factor, the potential injury to Mr. Doe if review is refused, is related to the analysis of the first factor. Mr. Doe's claim to continued service is attenuated, and the BCNR has already remedied the wrong initially suffered by Mr. Doe. Thus, the injury to Mr. Doe should this Court decline review is not of a magnitude which would compel judicial intervention. Therefore, this second factor also weighs in favor of the Navy.

The third factor, the type and degree of anticipated interference with the military function, weighs in the Navy's favor. Although some interference with the military decision-making process is always involved when a civilian court imposed its scrutiny, such an intrusion here would be serious enough to impede the military in its performance of vital duties. Recognizing that physical qualification is an important prerequisite in being an active member of the military, Congress has vested the military with discretion to establish physical standards and to determine who may serve in an active duty status. See Christian, 763 F.2d at 1324-25. As the above-referenced Secretary of Defense Memorandum establishes, Mr. Doe is not physically qualified for an extension of active duty beyond that granted him through the administrative process. Were this Court to undertake a

review of Mr. Doe's claim to future active service, it would constitute a significant and ill-advised intrusion into the sensitive realm of the military personnel decision-making process. Therefore, this third factor weighs in the Navy's favor and counsels against judicial review.

The fourth factor, the extent to which the exercise of military expertise or discretion is involved, is related to the third factor and also counsels against judicial review. As with factor three, the decision concerning further active duty service for a member of a Reserve component is one entrusted by Congress to the Executive Branch and the military departments. The current guidelines, as previously discussed, dictate that Reserve component members with evidence of HIV infection are not eligible for extended active duty. If this Court were to evaluate the priority of such a standard in

the military context, it would necessitate an incursion into the expertise and discretion that has been traditionally dedicated to the military. Thus, the fourth factor weighs in favor of the Navy.

Since this Court has concluded that all four Mindes factors weigh in favor of the Navy, review of this matter must be declined. However, even if the above factors weighed more favorably toward Mr. Doe, and this Court did decide to review his claim, he would not be successful. Mr. Doe has no constitutional right which has been violated.

In order to state a claim under the due process clause, Mr. Doe must first demonstrate the deprivation of some liberty or property interest. He has failed to establish that he has any such interest beyond the relief already granted. As the Court has previously discussed, the BCNR has accorded a complete relief to Mr. Doe

for his wrongful release from active duty in September of 1986. Subsequent to his wrongful release, however, the Secretary of Defense established a new policy for reserve component members with evidence of HIV infection. This policy is determinative of Mr. Doe's right to continued active service and, thus of his due process claim.

The Secretary of Defense Memorandum of 20 April 1987, clearly precludes additional periods of extended active duty for Service personnel who are HIV positive. In light of this regulation, Mr. Doe has no expectation of continued service that would give rise to a property interest. In addition, Mr. Doe has not come forward with any evidence to suggest that he has been deprived of a cognizable liberty interest. Although Mr. Doe asserts that he suffered damage to his reputation as a result of his wrongful discharge in September of 1986,

this allegation is insufficient to state a constitutional claim. See, Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976). Therefore, were this Court to review Mr. Doe's claim, it would conclude that he has failed to make a showing of a deprivation of either a liberty or property interest that violates due process. See Sims v. Fox, 505 F.2d 857 (5th Cir. 1974); Alberico v. U.S., 783 F.2d 1024 (Fed. Cir. 1986).

Finally, Mr. Doe is not entitled to an award of attorney's fees and costs as he is not a prevailing party in this Court. Although he did prevail at the administrative level to the extent he awarded one year's back pay and correction of his naval record, that is unrelated to proceedings before this Court. In denying Mr. Doe's application for a preliminary injunction this Court determined that the case had been prematurely commenced. At

that point the case could very well have been dismissed and Mr. Doe would have been forced to refile at the conclusion of the administrative process. Mr. Doe, therefore, is not entitled to an award of attorney's fees and costs.

Accordingly, it is now

ORDERED AND ADJUDGED:

That the defendants' motion to dismiss, considered by the Court as a motion for summary judgment, be, and the same is, hereby GRANTED. The clerk of the court is hereby directed to enter final judgment in favor of the defendants in this cause.

DONE AND ORDERED.

THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 89-3404

JOHN DOE,

Plaintiff-Appellant,

August 17, 1990

versus,

H. LAWRENCE GARRETT, III, as Secretary of the Department of the Navy, and J.W. HARRIS, as Commanding Office, Naval Air Reserve, Jacksonville,

Defendants-Appellees.

On Appeal from the United States District Court for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND

SUGGESTION(S) OF REHEARING EN BANC

(Opinion June 25, 1990, 11th Cir., 198__, ___F.2d___).

Before: KRAVITCH and JOHNSON, Circuit Judges, and KAUFMAN*, Senior District Judge.

PER CURIAM:

(x) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and

* Honorable Frank A. Kaufman, Senior U.S. District Judge for the District of Maryland, sitting by designation.

a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/
UNITED STATES CIRCUIT JUDGE

(2)

No. 90-803

In the Supreme Court of the United States

OCTOBER TERM, 1990

JOHN DOE, PETITIONER

v.

H. LAWRENCE GARRETT, III
SECRETARY, DEPARTMENT OF THE NAVY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

KENNETH W. STARR
Solicitor General
STUART M. GERSON
Assistant Attorney General
ANTHONY J. STEINMEYER
JOHN C. HOYLE
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether uniformed members of the armed services may bring private actions under the Rehabilitation Act of 1973.

2. Whether petitioner was deprived of procedural due process by a directive of the Secretary of Defense providing that reservists who are carriers of the AIDS virus are ineligible for extended periods of active duty.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 903 F.2d 1455. The opinion of the district court (Pet. App. 36a-64a) is reported at 725 F. Supp. 1210.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 1990. A petition for rehearing was denied on August 17, 1990. Pet. App. 65a-67a. The petition for a writ of certiorari was filed on November 15, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner enlisted in the Navy in 1972. Except for a brief period in 1975, he served continuously until 1977. Petitioner enlisted in the Naval Reserve in 1981 and served until January 1985. In July 1985, he reenlisted in the Naval Reserve for a period of two years. Petitioner also applied for and was admitted to the Naval Reserve Canvasser Recruiter (NRCR) program as a temporary active-duty petty officer assigned to assist in the Navy's recruiting efforts. Pet. App. 2a-3a. The NRCR program "is not a career program." Pet. App. 27a (quoting Naval Military Command Instruction 1001.1B). Assignments to the program are for a temporary period of 180 days, one year, or two years, and retention beyond the initial period "is not implied or guaranteed." *Ibid.* Petitioner initially was assigned to the NRCR program from November 25, 1985 through May 31, 1986. Pet. App. 41a. Thereafter, his service as a recruiter was extended until September 30, 1986. *Id.* at 41a-42a.

On July 20, 1986, petitioner was admitted to the naval hospital in Portsmouth, Virginia, because he had tested positive as a carrier of the AIDS virus, also known as Human Immunodeficiency Virus (HIV). Pet. App. 3a. A physical examination confirmed the presence of HIV antibodies, but determined that petitioner was otherwise in good health. *Id.* at 42a.

On August 26, 1986, after he had returned to his regular duty, petitioner was advised that he would not be continued on active duty after September 30, 1986. Pet. App. 43a. The next day, because of an administrative error, petitioner initially was permitted to extend his active duty status to September 30, 1987. *Ibid.* Later that day, however, the extension was cancelled. *Ibid.* On September 30, 1986, petitioner was released from active duty and returned to inactive reserve status. *Ibid.*

2. On September 22, 1986, petitioner filed an action alleging that his release from active duty violated Sections 501 and 504 of the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 390, 29 U.S.C. 791, 794, as amended, and the Due Process Clause of the Fifth Amendment. The district court denied his motion for a preliminary injunction and directed him to exhaust his administrative remedies. Pet. App. 43a-44a.

a. Petitioner then sought relief from the Board for Correction of Naval Records (BCNR). Pet. App. 44a. Before the BCNR, petitioner contended that his release violated a 1985 naval directive providing that "[m]embers who are HTLV-III antibody positive who demonstrate no evidence of progressive clinical illness or immunologic deficiency shall be retained in naval service." *Ibid.* The BCNR agreed with petitioner that the 1985 directive prohibited his release from active duty solely because he tested positive for the AIDS virus. Accordingly, the BCNR recommended that petitioner's naval records be corrected to show that he served on active duty until September 30, 1987, when he was transferred to the inactive reserve. Pet. App. 51a-52a. The Secretary of the Navy accepted the BCNR's recommendation and awarded petitioner backpay. *Id.* at 45a.

b. After the Secretary of the Navy accepted the BCNR's recommendation, petitioner sought further relief in the district court. He contended that (1) the policy announced in an April 1987 memorandum of the Secretary of Defense violated the Rehabilitation Act;[1] (2) the Navy had an obliga-

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[1] On April 20, 1987, while petitioner's case was before the BCNR, the Secretary of Defense issued a memorandum providing that "[r]eserve component members with serologic evidence of HIV infection are ineligible for extended active duty (duty for a period of more than 30 days) except under conditions of mobilization." Pet. App. 57a. The April 1987 memorandum "effectively supersede[d]" the 1985 directive on which petitioner had relied before the BCNR. *Ibid.*

tion under the Rehabilitation Act to implement an affirmative action plan for personnel handicapped by AIDS; (3) the Navy had violated petitioner's due process rights; and (4) he was entitled to attorney's fees and costs. Pet. App. 6a-7a.

On May 4, 1989, the district court entered summary judgment for the government. Pet. App. 36a-64a. The district court concluded that the Rehabilitation Act does not apply to uniformed members of the armed forces; that, under *Mindes* v. *Seaman*, 453 F.2d 197 (5th Cir. 1971), the court was precluded from reviewing the constitutionality of the Navy's personnel decision; and that, even if such review were not precluded, petitioner had failed to show that he was deprived of a constitutionally protected property or liberty interest. The district court also denied petitioner's request for attorney's fees and costs.

3. The court of appeals affirmed. Pet. App. 1a-35a. The court began its analysis by recognizing (Pet. App. 17a) that some courts of appeals have held that Section 501 provides the exclusive means by which federal employees may sue the government under the Rehabilitation Act.[2] The court

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[2] Section 501(b) provides:

> Each department, agency, and instrumentality (including the United States Postal Service and the Postal Rate Commission) in the executive branch shall, within one hundred and eighty days after September 26, 1973, submit to the Commission and to the Committee an affirmative action program plan for the hiring, placement, and advancement of individuals with handicaps in such department, agency, or instrumentality. Such plan shall include a description of the extent to which and methods whereby the special needs of employees with handicaps are being met. Such plan shall be updated annually, and shall be reviewed annually and approved by the Commission if the Commission determines, after consultation with the Committee, that such plan provides sufficient assurances, procedures and commitments to provide adequate

nevertheless ruled, following *Prewitt* v. *United States Postal Service*, 622 F.2d 292 (5th Cir. 1981), that federal employees may bring private actions under Section 504[3] as well as under Section 501. Pet. App. 20a n.10. The court held, however, that neither Section 501 nor Section 504 authorizes private actions by uniformed members of the armed forces. Section 501 affords plaintiffs the "remedies, procedures, and rights" of Section 717 of Title VII, 42 U.S.C. 2000e-16.[4] As the court noted (Pet. App. 9a), the courts of appeals have uniformly held that Title VII does not apply to uniformed members of the armed forces.

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hiring, placement, and advancement opportunities for individuals with handicaps.

29 U.S.C. 791(b).

[3] Section 504(a) provides in part:

No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. 794(a).

[4] The 1978 amendments provide, in part:

(1) The remedies, procedures, and rights set forth in Section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), including the application of sections 706(f) through 706(k) (42 U.S.C. 2000e-5(f) through (k)) shall be available, with respect to any complaint under [Section 501], to any employee or applicant for employment aggrieved by the final disposition of such compliant, or by the failure to take final action on such complaint.

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of assistance under [Section 504].

29 U.S.C. 794a(a).

Section 504 affords plaintiffs "the remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964." 29 U.S.C. 794a(a)(2). The court of appeals observed (Pet. App. 17a-18a), however, that those courts that have permitted federal employees to bring actions under Section 504 uniformly require them to exhaust their administrative remedies, just as if they had proceeded under Section 501. The court went on to note that "it would be incongruous to allow uniformed military personnel to bring discrimination claims against the military based on handicap when statutory claims based on sex, race, religion, or national origin are barred." *Id.* at 21a. Accordingly, the court held that petitioner's claim was barred under Section 504 as well as Section 501.

The court also held that petitioner had no claim under the Due Process Clause of the Fifth Amendment. The court found it unnecessary to "consider at any length the district court's initial finding that [petitioner's] claim is unreviewable" because the "due process claim so clearly fails on the merits." Pet. App. 30a. The court noted that petitioner's counsel had stated at oral argument that petitioner no longer sought damages on the due process claim, and that injunctive relief could relate only to petitioner's exclusion from reenlistment in the NRCR program. *Id.* at 25a-26a. The court concluded (*id.* at 26a) that "[t]he Navy's refusal to reenlist [petitioner] in the NRCR program does not impinge on any constitutionally protected property interest" because no statute, regulation or contract provides the predicate for a constitutionally protected expectation of continued military employment. The court held (Pet. App. 28a) that petitioner's "claim to a protected liberty interest is equally without merit," because petitioner has never disputed that he does in fact carry HIV antibodies.[5]

[5] The court of appeals also rejected petitioner's contention that the Navy was equitably estopped from denying him reassignment to the

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

1. The courts below correctly held that uniformed members of the armed services may not bring private actions under the Rehabilitation Act.

a. As originally enacted, the Rehabilitation Act contained no private right of action for federal employees. The 1978 amendments to the Act provided, however, that the "remedies, procedures, and rights" of Section 717 of Title VII "shall be available" in suits brought under Section 501 of the Rehabilitation Act. 29 U.S.C. 794a(a)(1). Federal employees generally may bring suit against the government under Section 717 of Title VII, see 42 U.S.C. 2000e-16, and therefore may also sue the government under Section 501 of the Rehabilitation Act. But the courts of appeals consistently have held that Title VII does not authorize private suits against the government by uniformed members of the armed services. See *Roper* v. *Department of the Army*, 832 F.2d 247,248 (2d Cir. 1987); *Stinson* v. *Hornsby*, 821 F.2d 1537, 1539, 1541 (11th Cir. 1987), cert. denied, 488 U.S. 959 (1988); *Gonzalez* v. *Department of the Army*, 718 F.2d 926, 927-929 (9th Cir. 1983); *Johnson* v. *Alexander*, 572 F.2d 1219, 1224 (8th Cir.), cert. denied, 439 U.S. 986 (1978). The courts have concluded that the language of Section 717 of Title VII authorizing employees in the "military departments" to bring suit does not apply to uniformed members of the armed services. Instead, the courts have concluded that Congress "intended a distinction between 'military departments' and 'armed forces,' the former consisting of

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NRCR program. Pet. App. 32a-35a. Petitioner has not raised the estoppel issue in his petition for certiorari.

civilian employees, the latter of uniformed military personnel." *Gonzalez*, 718 F.2d at 928. See also *Johnson*, 572 F.2d at 1224 & n.5; *Roper*, 832 F.2d at 248. Since uniformed members of the armed services may not bring suit under Title VII, they also may not bring suit under Section 501. In view of these authorities, petitioner has abandoned his claim under Section 501.

b. The court of appeals correctly rejected petitioner's contention that he is entitled to pursue a private action under Section 504. As an initial matter, several courts of appeals have concluded that Congress intended Section 501 to provide the exclusive remedy for federal employees under the Rehabilitation Act, and that therefore federal employees (and, *a fortiori*, uniformed service members) may not bring suit under Section 504. See *Johnston* v. *Horne*, 875 F.2d 1415, 1420 (9th Cir. 1989); *Johnson* v. *United States Postal Service*, 861 F.2d 1475, 1477 (10th Cir. 1988). See also *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624, 626-627, n.1 (1984) (Section 501 "governs the Federal Government's employment of the handicapped"); *McGuinness* v. *United States Postal Service*, 744 F.2d 1318, 1321 (7th Cir. 1984) (finding "great merit" in the view that "section 504 is inapplicable to federal employment"); *Milbert* v. *Koop*, 830 F.2d 354, 357 (D.C. Cir. 1987) ("strongly suggest[ing] that in the future, plaintiffs * * * seek relief under section 501 rather than section 504"). In our view, these decisions are correct. As Judge Posner observed in *McGuinness*, "it is unlikely that Congress, having specifically addressed employment of the handicapped by federal agencies (as distinct from employment by recipients, themselves nonfederal, of federal money) in section 501, would have done so again a few sections later in section 504." 744 F.2d at 1321.

Some courts of appeals—including the court of appeals in this case—have concluded that federal employees may bring suit under Section 504 as well as Section 501. *Smith* v. *United States Postal Service*, 742 F.2d 257, 260 (6th Cir. 1984); *Prewitt* v. *United States Postal Service*, 662 F.2d at

304. Although the courts of appeals are thus in disagreement over whether Section 501 is the exclusive provision under which federal employees may bring private actions under the Rehabilitation Act, this case is not an appropriate vehicle for resolving that disagreement. While the court of appeals concluded that federal employees may bring private suits under Section 504, it further concluded that uniformed members of the armed services—such as petitioner—may not. Thus, a determination that Section 501 provides the exclusive means for federal employees to sue under the Rehabilitation Act would not alter the result in this case.

Petitioner bases his Section 504 argument on Congress's determination that the "remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 [are] available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section [504] of this [Act]." 29 U.S.C. 794a(a)(2). This statutory language is not as helpful to petitioner as he suggests. First, the defendants in this action are the Secretary of the Navy and the commander of the Naval Air Reserve in Jacksonville, Florida. See Pet. App. 36a. Neither individual is a "recipient of Federal assistance" or a "Federal provider of such assistance" within the ordinary meaning of those words. More generally, Title VI itself does not afford a remedy for programs administered directly by the federal government rather than through a state or local intermediary. See *Soberal-Perez* v. *Heckler*, 717 F.2d 36, 38 (2d Cir. 1983) (Title VI applies only "where federal funding is given to a non-federal entity which, in turn, provides financial assistance to the ultimate beneficiary"), cert. denied, 466 U.S. 929 (1984). See also *United States Dep't of Transp.* v. *Paralyzed Veterans of America*, 477 U.S. 597, 605-606 (1986). In addition, Title VI, unlike Title VII, does not even authorize private actions by employees in the "military depart-

ments."[6] Even in the context of Title VII, the courts have properly "refuse[d] to extend a judicial remedy for alleged discrimination in civilian employment to the dissimilar employment context of the military, especially given the need for deference to the military in matters involving hierarchy and structure of command." *Roper*, 832 F.2d at 248. Finally, petitioner's argument is inconsistent with the structure of the Rehabilitation Act. "[I]t is unlikely that Congress, having specifically addressed employment of the handicapped by federal agencies * * * in section 501, would have done so again a few sections later in section 504." *McGuinness*, 744 F.2d at 1321. And as the court of appeals observed (Pet. App. 21a):

> Just as it would be incongruous to require persons claiming discrimination on grounds of sex, race, religion, or national origin—but not handicapped discrimination claimants—to follow Title VII procedures in suing federal employers, so it would be incongruous to allow uniformed military personnel to bring discrimination claims against the military based on handicap, when statutory claims based on s[illegible]race, religion, or national origin are barred.

The court of appeals correctly declined to attribute such an aberrant statutory design to Congress.[7]

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[6] Indeed, Title VI does not expressly authorize any private actions. In *Guardians Ass'n* v. *Civil Service Comm'n*, 463 U.S. 582 (1983), a majority of this Court expressed the view that a private plaintiff can recover backpay under Title VI. See *Darrone*, 465 U.S. at 630-631 & n.9. Here, however, petitioner is contending that Title VI allows uniformed members of the armed services to bring private actions against the federal government for injunctive relief.

[7] Petitioner also suggests (Pet. 15-17) that Congress intended the Rehabilitation Act to apply to the uniformed members of the armed forces, even though it did not intend for Title VII to apply to such persons, because "[o]nly [the Rehabilitation Act] acknowledges in some

c. The result reached by the court of appeals is reinforced by other statutes concerning uniformed members of the armed forces. Congress has provided that the Service Secretaries shall exercise "all powers, functions, and duties incident to the determination * * * of (1) the fitness for active duty of any member of an armed force under his jurisdiction * * * [and] (3) the suitability of any member for reappointment, reenlistment, or reentry upon active duty in an armed force under his jurisdiction." 10 U.S.C. 1216(b). In addition, the Secretary of the Navy has broad authority, "[e]xcept as otherwise provided by law," to "prescribe physical, mental, moral, professional, and age qualifications for the enlistment of persons as Reserves of the armed forces under his jurisdiction." 10 U.S.C. 510(b). And "the Secretary * * * may at any time release a Reserve * * * from active duty." 10 U.S.C. 681(a). These specific grants of authority concerning uniformed members of the armed services prevail over the more general provisions of the Rehabilitation Act. See *Traynor* v. *Turnage*, 485 U.S. 535, 547-548 (1988); *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 153 (1976). The courts below correctly concluded that, in enacting the Rehabilitation Act, Congress did not intend to withdraw its broad grant of authority to the armed forces to establish physical and mental qualifications for its members in uniform. See *Smith* v. *Christian*, 763 F.2d 1322 (11th Cir. 1985).

d. Petitioner's reliance (Pet. 12-14) on *Consolidated Rail Corp.* v. *Darrone*, *supra*, and *Alexander* v. *Choate*, 469 U.S. 287 (1985), is misplaced.

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cases that discrimination is permissible, if a handicapped person absolutely cannot perform a job duty." *Id.* at 16. But Title VII, like the Rehabilitation Act, does not require employment of persons who are unqualified for the job. See, *e.g.*, *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430-31 (1971).

In *Darrone*, this Court concluded that Title VI's limitation to employment practices "where a primary objective of the Federal financial assistance is to provide employment," 42 U.S.C. 604, does not apply to the Rehabilitation Act because the language and legislative history of the Rehabilitation Act do not indicate that Congress intended such a limitation. 465 U.S. at 631. This Court relied in *Darrone* on the fact that the agency responsible for coordinating enforcement of Section 504 "from the outset has interpreted that section to prohibit employment discrimination by all recipients of federal financial aid, regardless of the primary objective of that aid." 465 U.S. at 634 (footnote omitted). Here, in contrast, Congress has enacted specific statutes granting the Secretary broad authority to establish physical and mental qualifications for active duty personnel, and no federal agency has ever applied the Rehabilitation Act (or, for that matter, Title VI or Title VII) to private suits by uniformed members of the armed services.

In *Alexander* v. *Choate*, this Court rejected the argument that Section 504 reaches only purposeful discrimination because it concluded that Congress perceived discrimination against the handicapped to be most often "the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect." 469 U.S. at 295. That ruling has no application to the issue presented here. To the extent that *Alexander* is instructive at all, its most relevant principle is that "[a]ny interpretation of [Section 794] must * * * be responsive to two powerful but countervailing considerations—the need to give effect to the statutory objectives and the desire to keep § 504 within manageable bounds." 469 U.S. at 299. For the reasons we have stated, allowing uniformed members of the armed forces to bring private suits would cause Section 504 to exceed "manageable bounds."

2. Petitioner briefly argues (Pet. 19) that his procedural due process rights were violated by the Secretary's decision to adopt a policy that reservists who have tested positive for the AIDS virus are ineligible for extended active duty except during a mobilization. This argument warrants no further review.

This Court has held that enlisted personnel may not maintain *Bivens*-type actions to recover damages from superior officers for alleged constitutional violations. *Chappell* v. *Wallace*, 462 U.S. 296 (1983). The Court's holding in *Chappell* is based on the recognition that "courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have." *Id.* at 305 (quoting Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. Rev. 181, 187-188 (1962)). See also *Rostker* v. *Goldberg*, 453 U.S. 57, 65-67 (1981); *Schlesinger* v. *Ballard*, 419 U.S. 498, 510 (1975); *Orloff* v. *Willoughby*, 345 U.S. 83, 93- 94 (1953).

In any event, petitioner's constitutional rights were not violated in this case. Petitioner had no property right in his continued assignment to the NRCR program. The rules governing that program expressly provide that assignments are of a temporary nature, that retention beyond the initial period is not "implied or guaranteed," and that the NRCR program "is not a career program." Pet. App. 27a. Thus, any unilateral expectation of continued employment petitioner may have had did not rise to the level of a property interest. Cf. *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972).

Nor has petitioner shown that he was deprived of a protected liberty interest. Even assuming that the Navy's decision to bar petitioner from reappointment to the NRCR program could implicate a liberty interest if it were based on false and stigmatizing reasons publicized by the Navy, petitioner does not dispute that he in fact carries HIV anti-

bodies. Because petitioner failed to raise a "factual dispute * * * which has some significant bearing on his reputation," *Codd* v. *Velger*, 429 U.S. 624, 627 (1977), the courts below properly rejected his claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General
STUART M. GERSON
Assistant Attorney General
ANTHONY J. STEINMEYER
JOHN C. HOYLE
Attorneys

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